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NO. 720

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1967 TERM

WILL RAY HENRY,
PETITIONER,

VS.

DELHI-TAYLOR OIL CORPORATION,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITIONER'S PETITION FOR REHEARING

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ATTORNEYS FOR PETITIONER

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OPINION BELOW

The judgment of the Supreme Court of Texas is reported in 416 SW2nd 390.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of 28 USCA 1257 (3).

POINT PRESENTED

There is a controlling decision rendered by the Supreme Court of the United States which was not heretofore presented.

ARGUMENT

THERE IS A CONTROLLING DECISION RENDERED BY THE SUPREME COURT OF THE UNITED STATES WHICH WAS NOT HERETOFORE PRESENTED.

Petitioner recognizes that his petition has been fully considered and denied by this Court by Order dated December 18, 1967, but he respectfully petitions for rehearing on the ground that a controlling decision of this Court, of which he was unaware when he filed his Original Petition, is a substantial ground available to petitioner although not previously presented. The decision heretofore overlooked by Petitioner is Brinkerhoff-Faris Trust & Savings Co. vs. Hill, 281 US 673, (1930). In an opinion by Justice Brandeis for a unanimous Court at 281 US 678 it was held that

> "The judgment of the Supreme Court of Missouri must be reversed, because it has denied to the Plaintiff due process of law . . . using that term in its primary sense of an opportunity to be heard and to defend its substantive right." (emphasis added)

The Court went to some length to recognize that it is for the State Court to decide questions of State law and then pin pointing the central question went on to state,

> "Our present concern is solely with the question whether the Plaintiff has been accorded due process in

> the primary sense - - - whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the State Court had the power to construe the Statute dealing with the State Tax Commission; to re-examine and overrule the Laclede case. Neither of these matters raises a federal question; neither is subject to our review. But while it is for the State Supreme Courts to determine the adjective as well as the substantive law of the State, they must, in doing so, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." (emphasis added) See also Bouie vs. City of Columbia 378 US 347, (1924).

Under this controlling decision, the Supreme Court of Texas has clearly denied Petitioner due process of law guaranteed under the Fourteenth Amendment to the United States Constitution.

When this case was tried and heard on appeal, the law of Texas, as authoritatively declared by the Texas Supreme Court in Galveston-Houston Elec. Ry. Co. vs. Reinle, 113 Tex. 456, 258 S.W. 803 (1924), was that an owner-occupier was required to give notice of a dangerous condition to an employee of an independent-contractor, and that notice to the employer was not enough. There was therefore no reason to present evidence, or request a special issue, on the extent of notice to the employer. (emphasis added) This rule was changed by the Texas Supreme Court in this case. That Court said, 416 SW2nd at 393:

> "Our holding here is diametrically opposed to the holding made in Galveston-Houston Elec. Ry. Co. vs. Reinle, 113 Tex. 456, 258 S.W. 803 (1924), and to hold as we do in this case, we must, and do, overrule that de-

> cision . . . There is no sound basis for distinguishing that care from the instant case. Reinle must either be followed or overruled."

It was entirely within the power of the Texas Supreme Court to abide by, or to overrule, the Reinle rule. But when the Texas Supreme Court went on to order judgment as a matter of law for defendant, on the ground that Petitioner's employer had had notice of the dangerous condition and that this now sufficed, it resolved against Petitioner an issue on which he had never been heard and on which no jury had passed. In doing so, the Texas Supreme Court denied Petitioner his day in Court. (emphasis added)

By a timely petition for rehearing Petitioner asserted in the State Court that its decision had denied him "due process of law under Article 1, Section 19 of the Texas Constitution and under the Fourteenth Amendment of the United States Constitution." When relief was refused him by the State Court, he came here asserting that the State Court had denied him "his 'hearing' guaranteed by the due process provisions of the Fourteenth Amendment to the United States Constitution." Thus his attack on the action below as a denial of due process was raised at the first opportunity in the State Court and properly brought here.

In bringing that issue here, however, petitioner was unaware of the decision of this Court most closely related to what happened in the present action, and thus was unable to make a sufficiently persuasive showing that the State Court had decided a federal question of substance in a way probably not in accord with applicable decisions of this Court and thus that there are special and important reasons for this Court to exercise its discretion to hear this case. (emphasis added)

In the Brinkerhoff-Faris case the Missouri Court held that a Plaintiff was not entitled to equitable relief against an allegedly discriminatory tax assessment because it had not pursued its "adequate, certain, and complete" remedy of complaint with the tax commission. Six years earlier the State Court had held that the Tax Commission had no power to give relief in such circumstances, and that it would be "preposterous," "unthinkable," and "unconstitutional" to hold that the commission had such power. By petition for rehearing Plaintiff urged that the unforeseeable overruling of the earlier case transgressed the due process clause of the Fourteenth Amendment.

It is for Texas to decide, as it has done, that notice to the independent-contractor of a dangerous condition satisfies the duty of a landowner to employees of the independent-contractor. The Constitution of the United States, however, precludes Texas from announcing such a rule without giving petitioner opportunity to prove that he is entitled to recovery even under the new rule. (emphasis added) Perhaps he can make such proof to the satisfaction of a jury, Perhaps he cannot. The constitutional mandate is that he is entitled to try.

Plaintiff's cause of action is created by statute, Art. 8307 Sec. 6a. V.A.C.S., which incorporates the common law of the State of Texas by providing that

> "When the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may . . . proceed . . . at law against that person to recover damages . . ." Art. 8307 Sec. 6a, Vernon's Annotated Civil Statute."

Prior to the decision here complained of the incorporated common law that controlled this particular fact situation was to be found in the Reinle decision, 113 Tex. 456, 258 S.W. 803 (1924).

In the decision complained of the Texas Supreme Court admitted that the Court was required to overrule the Reinle decision in order to render the decision it did in the present case. Thus the rule of law which was made part of the statute was the Reinle decision which had stood for over Forty years as the Texas Supreme Court's final word on this rule of law. It was the state of the law prior to the time Petitioner was injured and all during the prosecution of his cause of action up to the Texas Supreme Court's decision.

Thousands of other injured parties have had the benefit of recoveries under this statute and the common law rule of the Reinle case incorporated there. Now, only after trial and appeal, the Texas Supreme Court decides that this claimant, Will Ray Henry, is not entitled to the rule of law that governed his cause of action made applicable to his circumstances through statute which incorporated within it the Reinle decision.

Petitioner at the time of his injury was subjected to a fact situation from which he cannot remove himself. The rule of law that governed this specific fact situation provided that the owner-occupier of land owed a duty to an employee of an independent-contractor to provide such employee with a safe place in which to work or to warn him of dangerous conditions that existed on such premises and that this duty could NOT be satisfied or discharged by the owner-occupier's warning to the employer-independent-contractor of this condition. Regardless of any developing trends away from this rule of law, this was the rule of law last announced by the

highest court in the State. Parties subjected to a given fact situation upon which the State's highest court has rendered its decision, must not only be bound by the rule of law but must also have access to that same rule of law for the protection of their rights and recovery for wrongs perpetuated upon them. To deny the same rule of law to the same or similar fact situations, as has been done by the Texas Supreme Court, is to openly deny due process of law. The denial of the same rule of law makes meaningless all trials and hearings that have preceded such denial. The Texas Supreme Court by its decision in this case has declared as a practical matter; you were entitled to recover under the rule of law controlling your fact situation all during the litigation that has gone before; however, we are now changing the rule of law that is applicable to your fact situation and under this changed rule of law, you are not allowed to recover since you did not meet the requirements to recover when you had the opportunity in the Court's below even though those requirements were not required of you under the previous rule of law. Furthermore, we are not going to allow you the opportunity to present your claims under the requirements of this changed rule of law. Can it be denied that the Texas Supreme Court has denied Petitioner due process of law?

To have avoided this flagrant violation of the equal protection clause would have been such a simple matter. The Texas Court could have reversed and remanded the case with instructions for retrial under the changed rule of law that it announced. If this had been done who could be heard to complain? However, this was not done and as a practical effect of the Texas Court's judgment this Petitioner has been denied his guaranteed right to even be heard under the new rule of law now announced by the Texas Supreme Court. How can it be said that Petitioner has had his day in Court to present his claim when the controlling rule of law that

governs that fact situation from which Petitioner cannot escape was not even announced until long after those proceedings were history?

The fourth quarter of the ball game was completed and the score board clearly indicated that Petitioner Henry was victorious. Then after the final gun had sounded the officials declared a change in the rules of the game that eliminated Petitioner's total score and further declared that the opponent Delhi-Taylor was the victor under the changed rule.

For the reason that there exists a controlling decision which has now been presented to the Court and for the reasoning supporting the decision rendered by this Court, Petitioner implores this Honorable Court to reconsider his Petition for Writ of Certiorari and to grant the same.

Respectfully submitted,

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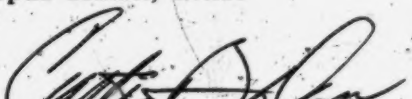
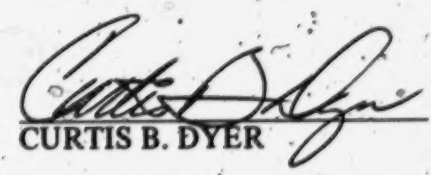
By 
CURTIS B. DYER
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL AND SERVICE

Pursuant to Rule 58 of the Supreme Court Rules, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Paragraph 2 of Rule 58. A copy of the

foregoing brief, has been served on Mr. William H. Keys, Keys, Russell, Watson and Seaman, 18th Floor Driscoll Building, Corpus Christi, Texas, Attorneys for Respondent.



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